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NO.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Term, 1985

LEWIS C. STANLEY, Petitioner,

v.

JOHN AUBERT, JOAN AUBERT AND SINKERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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GM Printing Services, Inc. 924-0900

QUESTIONS PRESENTED

Does it violate the Fourteenth Amendment of the U.S. Constitution to disqualify an attorney upon the ground of "appearance" of conflict of interest where admittedly there was no actual conflict or prejudice to his clients' adversaries, equal partners in a corporation, who never imparted any confidences or information to him before they commenced an action a year after the attorney was retained to incorporate and represent the corporation as to which the attorney before and during the suit sought to prevent violations of their fiduciary duty by those adversaries?*

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* *Explanation as to the Parties:* Petitioner Stanley represented below the interests of New Horizons Business Systems, Inc., on behalf of George T. McMahon and Grace McMahon, equal partners therein. As explained in greater detail *infra*, he could not name them as parties herein on this petition because the New Jersey appellate courts refused a request by the McMahons that Petitioner represent them on their appeal from the disqualification and the dismissal without trial of their claims in the interest of New Horizons thereafter for alleged failure to appear which they denied.

The other equal partners are John and Joan Aubert, Respondents with Sinkers, Inc., a corporation owned completely by the Auberts. They formed it some months after Stanley, retained by the McMahons with prior approval of the Auberts, acted as the sole incorporator of New Horizons which then computerized a bond data book for Janney Montgomery Scott by whom Aubert was employed as a bond salesman. When the McMahons learned that Aubert, managing partner in New Horizons, was producing floppy discs in New Horizons headquarters on the New Horizons computer (housed in the small print shop owned by the McMahons known as GM Printing and used as New Horizons headquarters) but intending to use them not for New Horizons but for a Sinkers contract with Merrill Lynch for a similar bond book, they called in Stanley. Petitioner then deposited them as New Horizons property in its bank for safekeeping and sought to bring the Auberts and McMahons together to explain the fiduciary duty all owed to New Horizons. He was rebuffed by counsel for Aubert-Sinkers who started, by Order to Show Cause with Temporary Restraints obtained *ex parte*, a suit for possession of the discs for Sinkers naming as defendants Petitioner, the McMahons and GM Printing. The McMahons lacking resources to pay customary legal

* cont'd

fees, asked Stanley to represent them for a nominal retainer and contingency and he agreed insofar as their interests coincided with those of New Horizons he was duty bound to protect. Petitioner by motion attacked the complaint which failed to set forth the corporate purposes of New Horizons. When these were made known on the return day, the Judge ordered Aubert-Sinkers to account to the McMahons for all monies from the Merrill Lynch contract which Stanley had asked be carried out for New Horizons' benefit; the discs were turned over not to Sinkers but to Aubert for that purpose alone. Two Judges denied motions by Aubert-Sinkers to disqualify Petitioner before a third trial Judge granted it when trial on the merits of the conflicting claims was to begin.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

NO _____

LEWIS C. STANLEY,
Petitioner,

v.

JOHN AUBERT, JOAN AUBERT,
and SINKERS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF NEW JERSEY

Petitioner Lewis C. Stanley prays that a writ of certiorari issue to review a final order of the Supreme Court of New Jersey, the highest court of the state. (P1a of the separately bound Appendix for this petition).

Without opinion, it denied certification (P3a) and dismissed his appeal (P2a) from disqualification as attorney in the interests of New Horizons Business Systems, Inc. (Horizons), a N.J. Corporation he was retained to incorporate and represent as to any legal problems which might arise. He had been retained orally by George T. McMahon and his wife, Grace McMahon who, it is admitted, were authorized to contact petitioner Stanley

by their equal partners in the Horizons corporation, respondents John Aubert, the managing partner therein, and his wife Joan. Petitioner was indeed the sole incorporator of Horizons. He was moreover, Joan Aubert avowed upon depositions, the only attorney ever considered for the corporation by the partners and paid a fee, modest as it was, by Horizons rather than by any individuals therein. (The corporation has no parent company, subsidiaries or affiliates.)

Extant, when claims by the McMahons in the interest of New Horizons against the Auberts for subsequent violation of their fiduciary duty to Horizons were dismissed without a hearing on the merits under circumstances hereinafter set forth, was an Order (P166a) requiring the Auberts and their alter ego corporation, the respondent Sinkers, Inc., to account for all monies received from the latter's contract with the brokerage house of Merrill Lynch to produce the same kind of computerized bond data book which Horizons had produced for another house, Janney Montgomery Scott.

The N.J. Supreme Court's final order entered June 3, 1985 left standing a one-paragraph decision of the Superior Court Appellate Division (P53a) affirming the disqualification order below on the basis of the trial Judge's oral determination (P83a) and letter opinion (P107a). The Appellate Division also refused a request by the McMahons that Stanley be permitted to represent them (P64a-79a) on their appeal (P63a) from dismissal without trial of their claims against Aubert-Sinkers, prior disqualification of Stanley and denial of their motion to disqualify counsel for Aubert-Sinkers who purported to join with them as if it were also his client the Horizons corporation and then made claims for Aubert-Sinkers adverse to Horizons (P148a). See the attack on the Aubert-Sinkers complaint by way of motions in the interest of Horizons (P161a). This led on the first return day of the litigation to the Order to Aubert-Sinkers to Account (P166a), the essential predicate of which is that the Auberts were violating their fiduciary duty to Horizons and their partners therein.

The refusal of the Appellate Division to allow Stanley to represent the McMahons in the interest of Horizons on appeal should serve to explain why petitioner could not undertake to name them as parties represented on this petition. After the Appellate Division refusal, the McMahons wrote to the Clerk requesting a stay of their appeal until review of the disqualification was completed, stating "inasmuch as we do not have funds to hire another attorney, we sincerely feel that our constitutional rights would be violated if we were left without counsel" (P80a-82a).

The *28 U.S.C. 1257 (3)* jurisdiction of this Court is invoked under the Fourteenth Amendment of the United States Constitution, Section 1 thereof providing:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 27, 1983 trial on the merits after 2½ years was aborted when the trial Judge allowed Aubert-Sinkers to renew orally without notice a motion -- denied by two prior Judges -- to disqualify opposing counsel, the petitioner herein. It alleged conflict of interest as to the Auberts because of their interest in Horizons incorporated by Stanley. No claim of any conceivable trial prejudice was asserted nor was contact of any kind imparting any relevant information whatsoever, let alone any confidences. The only other ground put forth to which even the disqualifying Judge gave no credence was that they wanted Stanley to be a witness (P89a). *Disciplinary Rule 5-102 (B)*, then in effect in New Jersey, makes it clear that a lawyer may continue to represent his clients when he is called by someone else as a witness until it becomes "apparent that his testimony is or may be prejudicial to his client." The McMahons saw no need for Stanley to be a witness and he disavowed any such intention. Everything he had said or done in acting as the sole incorporator of Horizons was a matter of record known to all. This was likewise the case with his efforts to try to stop the Auberts' breach of their obligations to the corporation and their partners therein, without wasteful litigation they could not afford, by bringing everyone together for reasoned consideration of New Jersey's public policy as to fiduciary duty.

Those efforts were set forth in a letter April 27, 1981 to all concerned which is the essential key to understanding what happened in this case. Set forth at P134a of the Appendix, it also attached extracts of the New Jersey cases rejecting any compromise of the fiduciary duty of undivided loyalty. In explaining why Stanley had deposited, as Horizons property in the Horizons bank for safekeeping against any use adverse to the corporation, certain floppy discs with bond data produced by John Aubert on the Horizons computer in Horizons headquarters within its corporate purposes but intended to be diverted therefrom for personal Aubert gain, it explores at some length Stanley's limited acquaintance with the partners and states (P140a):

My relationship, then, was such that there would be no legal or professional inhibition in representing interests adverse to any of yours in matters that had no connection with things as to which I had helped. Nevertheless on a personal basis, I would have refused to do so.

That was the situation when you folks came to me in February, 1980 to organize as equal partners the joint venture known as the New Horizons corporation. That created a reciprocal duty of the utmost undivided loyalty that each of you have to the other with respect to such business enterprise. It also created a professional obligation on my part with respect to such duties incumbent upon all of you.

If after informing all of you -- and that's what I wanted to do and to be sure of when I proposed a meeting because I was quite frankly shocked and bitterly disappointed with what John was trying to do -- of such duties, rights and expectations, any of you knowingly and deliberately still tried to secure personal advantage at the expense of the other in connection with transactions that properly belong to the enterprise, I would not only be free but it would be and is my duty -- both professionally and personally -- to resist such willful misconduct vigorously and seek redress for the victimized parties against any attempted violations of your fiduciary obligations to each other.

Although the first Judge who denied in May, 1981 the Aubert-Sinkers motion to disqualify struck from the form of order he had their attorney prepare the words "without prejudice" (P170a), the same motion was orally granted on September 28, 1983 by a trial Judge who agreed that it was undisputed that

there were no confidences imparted by the Auberts to Stanley (P104a):

> THE COURT: Yes. I don't see any -- there certainly is no representation by counsel that there is any actual confidence exchanged.

The basis for the disqualification was "because you represented the Auberts and the McMahons at least insofar as you carried out their wishes, fulfilled their wishes in incorporating New Horizons" (P83a). That "the client is the corporation and not the stockholders, officers, directors or employees thereof" had, however, been established as the governing principle of law in New Jersey by *Opinion 462* of the *N.J. Advisory Committee on Professional Ethics*, adopting *Ethical Consideration 5-18* set forth at P20a-21a of the Appendix and emphasizing yet again the oft-quoted stricture of undivided loyalty imposed upon lawyers as well as parties who are fiduciaries. The N.J. Supreme Court said in *Lyons v. Barrett, 89 NJ 294, 300 (1982)* that it was "basic" in New Jersey law that "a corporation is an entity separate from its stockholders. ...Conversely, one who accepts the benefits of incorporation must also accept the burden that flow from the use of a corporate structure."

Nevertheless the disqualifying Judge said in a subsequent letter opinion as to the determination, "It is important to understand that this does not relate to real conflict but to the public apprehension of conflict" (P113a). However she denied the McMahons' motion to disqualify lawyers who were purporting to represent at one and the same time the conflicting interests of Aubert-Sinkers and New Horizons and making for Aubert-Sinkers claims hostile to the interests of New Horizons (P95a-98a).

Given as the reason for rehearing motions twice previously denied was a "belief" that Stanley had failed to adhere to a condition imposed by the second judge (P111a). That such "belief" was without any support in the record was made clear in the Appellate Division (P74a, footnote 2). The second Judge

Dreier gave no credence to the assertion that there was any conflict of interest as to the Auberts and denied the motion. He did *sua sponte* conceive of a possibility of conflict of interest vis-a-vis Stanley and the McMahons. However he reversed himself as to disqualification of Stanley on that ground when the McMahons protested vigorously: that there had been fullest disclosure to them, that any notion of conflict was far-fetched, that they were without resources to engage other counsel and disqualification would violate *Disciplinary Rule 5-101 (A)* because they desired Stanley's representation in the interests of New Horizons after full disclosure. The only condition he imposed was that if Stanley saw any conflict becoming possible, he make full disclosure to the McMahons. Asked by Stanley if he saw any conflict in representing the McMahons only insofar as they were asserting the interests of New Horizons, Judge Dreier replied (P74a):

> It is not my function to respond to your questions as to whether in your mind you're representing the best interests of a corporation or not. That is between you and your clients, and not for the Court to get into.

The oral disqualification on September 28, 1983 elicited immediate objections by Petitioner of violations of due process (P92a-104a). Expressing certainty that review of the disqualification would not be treated as an ordinary interlocutory appeal (P100a), the trial Judge promised to adjourn the matter until there was an "opportunity to carry out your remedies as you see fit" (P105a). However, after refusing to reconsider the disqualification, the trial Judge denied an application for a stay pending appellate review (P106a). It was then sought by notice of appeal and motion for leave to appeal but was denied as interlocutory. A rather frenzied search ensued for an attorney who might be willing to represent the McMahons for a nominal retainer and a contingent fee. In March, 1984, an attorney, reached through mutual acquaintances, Philip Rosenbach of Livingston, New Jersey agreed to go over the three-years files and expressed some interest.

On March 15, 1984 the McMahons received in an envelope postmarked March 13, 1984 a notice dated March 5, 1984 for a pretrial conference on March 20, 1984 (P121a). Mr. Rosenbach was notified and the next day, Friday, March 16 he called the chambers of the Judge and was advised the pretrial conference had been adjourned without date. On Monday, March 19 Mrs. McMahon was informed when she called the Judge's office that the pretrial had been re-scheduled for Wednesday, March 28 at 1:30 p.m. This information was given to Mr. Rosenbach who confirmed by telephone the next day to the Judge's office the pretrial date of March 28. He then arranged to confer with Mrs. McMahon and Stanley at his Livingston office on March 27. After discussing the matter at some length that day, Mr. Rosenbach indicated he would not commit himself until after the pretrial the next day but was inclined to go along with a contingent fee and a retainer in installments. Petitioner Stanley met Mr. Rosenbach on March 28, 1984 at the courtroom in Trenton to see what would transpire at this pretrial. However when they went into the outer office of the Judge's chambers, they were told by a secretary that all claims of the McMahons had been dismissed because they failed to appear the day before for trial. When Mr. Rosenbach asked to see the Judge briefly to ascertain how this could have happened, the secretary refused. Mr. Rosenbach returned immediately to his office some 50 miles from Trenton and later told Mrs. McMahon that this turn of events necessitated a different fee arrangement. The McMahons could not meet his demand (P128a, 130.1a-130.2a, 81a).

On April 5, 1984 in an envelope postmarked April 3, the McMahons received a letter dated March 28 from the trial Judge that their claims had been dismissed "due to absolute refusal to appear for the trial of this matter on March 27, 1984." (P123a). They answered "to set the record straight" that not only did they did not refuse to appear but had been advised "by your office (by Joan Noonan) that a Pre-Trial Hearing (not a Trial) was to be held on Wednesday, March 28. This was also the information provided by your office to our attorney on Monday afternoon March 19th so it is unlikely that it is a misunderstanding on our part." (P127a). The only written notice the McMahons ever received was for pretrial not trial (P121a).

Notwithstanding the above, the Chancery Division Judge issued Judgment April 24, 1984 dismissing the McMahon's claims in the interest of Horizons (P131a). They appealed from all of this final trial Court judgment, including disqualification of counsel (P63a) while Stanley appealed the disqualification (P62a). Unusual extreme delay in receiving a docket number prompted an emergent application to the Appellate Division for same and that Stanley be permitted to represent the interests of Horizons on behalf of the McMahons on appeal (P64a). As noted *supra*, this was denied without any reasons being given (P78a-79a). The McMahons then requested the Appellate Division put their appeal on "hold" until Petitioner's disqualification appeal was completed (P80a-82a). However their appeal was dismissed.

Federal constitutional questions, such as the due process violations protested in the court of first instance (P92a-104a), were explicated in the Appellate Division of the N.J. Superior Court and in the state Supreme Court. The Notice of Appeal to the state Supreme Court was based upon the ground that "a substantial question exists as to whether (Petitioner's) rights and those of clients, George T. McMahon and Grace McMahon in the interest of New Horizons Business Systems, Inc., under the Constitution(s) of the United States are violated..." (P2a). The "violations of rights, protected against groundless

encroachment by the Constitution(s) of the United States'' were raised in Petitioner's brief (P7a) as was the *ABA* Law Note on *Professional Responsibility, p. 9 (ABA Press, 1979)* that ''A party should not be permitted to disqualify the opposing attorney unless he is able to show real prejudice'' (P16a) and Judge Weinstein's warning in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 FS 581, 589 (ED NY 1973) aff'd 518 F 2d 751 (2 CA 1975)*:

> The danger of damage to public confidence in the legal profession would be great if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification.

Cited was the ethical injunction that an attorney for a corporation is obliged ''to take active steps to oppose'' violations of fiduciary duty set forth in ''Developments in the Law, *Conflicts of Interest in the Legal Profession,'' 94 Harv. LR 1247, 1336, 1352 (April 1981)* (P12a) as was the insistence therein as applicable to civil as well criminal cases that (p.1295):

> ... adequate assistance of counsel is the universal predicate to vindicate basic rights of due process of law and to providing clients with a meaningful day in court. (P17a); (see also P35a in the Appellate Division.)

Likewise noted was the warning of the N.J. Supreme Court in *In re Professional Ethics Opinion 452, 87 NJ 45, 50 (1981)* that ''where there is no conflict in fact, an appearance can sometimes shade into the illusion of conflict'' and appearance of conflict ''must be something more than a fanciful possibility. It must have some reasonable basis.''(P17a). The utter standardless subjectivity of ''appearance'' where there is no conflict in fact was raised (P19a) as put forth in *Woods v. Covington Cty. Bank, 537 F 2d 804 (5 CA 1976); Duncan v. Merrill Lynch, 646 F 2d 1020 (5 CA 1981); Wayland v. Shore Lobster Corp., 537 FS 1220 (SD NY 1982); Bobbitt v. Victorian House, Inc., 545 FS 1124 (ND ILL. 1982); Allegaert v. Perot, 434 FS 790, 799 n. 13 (SD NY 1977); City of Cleveland v.*

Cleveland El. Co., 440 FS 193, 201-205 (ND OH 1976) aff'd 573 F 2d 1310 (6 CA 1977) cert. den. 435 US 996 (1978). See P49a in the Appellate Division.

It was urged to the state Supreme Court (P22a):

> It should be obvious that an attorney, as much as anyone else, has property and liberty rights to practice his profession and further his economic and reputational interests, subject only to legitimate regulation that is within the confines of the constitutional permissible. (See also P57a, P59a-60a in the Appellate Division.)

And at P23a:

> That which is groundless, arbitrary, capricious and unreasonable is in the law a violation of substantive due process. It is an invasion of these constitutional rights of a lawyer under ... the Fifth and Fourteenth Amendments of the *U.S. Constitution* to disqualify an attorney from pursuing his profession and the rights of his clients for reasons that are utterly groundless and completely subjective when in fact he is following established precepts of ethical conduct and obligation and the judicial public policy of undivided loyalty by fiduciaries. (See also P30a in the Appellate Division).

Raised in Appellate Division papers which went to the state Supreme Court was the constitutionally protected liberty interest of an attorney (P59a):

> As important as his property interest is an attorney's liberty interest, likewise constitutionally protected, to be of service to other people, his community and the proper administration of justice. He has an indispensable role to play in "blowing the whistle" against injustice. He is enjoined to carry out his

> professional and ethical duty "to improve not only the law but the administration of justice." *In re Howell, 10 NJ 139, 140 (1952).* Likewise he has an official duty to devote himself to his client, *In re Callan, 66 NJ 401, 410 (1975).*[1]

Cited to the Appellate Division in this regard (P60a) was the vigorous statement of this Court in *Sachar v. United States, 343 US 1, 13 (1952)*:

> ...this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of advocate on behalf of any person whatsoever.

That because of their "essential" function, *In re Primus, 436 US 412, 422 (1978)*, in our system of justice, the attorney's role is entitled to careful constitutional protection was made manifest by citing *Manness v. Meyers, 419 US 449, 472 (1975)*, Mr. Justice Stewart (P60a):

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing,

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[1] It is probable but certainly at the least arguable that such interest is protected as a First Amendment right when the attorney is in Court for his clients. Although not mentioned below, such First Amendment rights have been so zealously protected by this Court that they may well be considered herein. This Court has held that lawyers accepting employment under a plan that is protected by First and Fourteenth Amendment rights "have a like protection which the State cannot abridge." *Railroad Trainmen v. Va. State Bar, 377 US 1, 8 (1964); In re Primus, 436 U.S. 412, 426 (1978); cf. United Transportation Union v. State Bar of Michigan, 401 US 576 (1971); United Mine Workers v. Illinois State Bar, 389 US 217 (1967).*

and therefore, of due process in the constitutional sense.[2]

This was the heading of Petitioner's first point in his Appellate Division brief (P33a):

> PARTNERS WHO AUTHORIZE THEIR PARTNERS TO ENGAGE A NAMED ATTORNEY ARE BOUND BY ACTS AND DECLARATIONS OF THOSE SO AUTHORIZED THAT THE ATTORNEY IS TO REPRESENT THEIR BUSINESS ENTITY HE INCORPORATES. PARTNERS SO BOUND WHO IMPART NO CONFIDENCES WHATSOEVER TO THE ATTORNEY MAY NOT SEEK TO DISQUALIFY HIM FOR ALLEGED "APPEARANCE OF CONFLICT" WHEN HE TRIES TO HAVE THEM FULFILL THEIR FIDUCIARY DUTY OF LOYALTY TO THE CORPORATION AND ACTIVELY OPPOSES THEIR BREACH THEREOF. THIS IS ESPECIALLY SO WHEN THE PARTNERS SO BOUND KNOW THEIR PARTNERS WILL BE EFFECTIVELY DEPRIVED OF COUNSEL BECAUSE THEY CANNOT AFFORD CUSTOMARY FEES OF ATTORNEYS WHO HAVE NO PRIOR ETHICAL OBLIGATION TO PROTECT THE CORPORATION'S INTERESTS. TO HOLD OTHERWISE IS SO

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[2] That Petitioners having a fiduciary or confidential relationship with those who are technically non-parties to a petition to this Court are entitled to -- and should -- assert the latters' constitutional rights was made clear in *Griswold v. Connecticut, 381 US 479, 481 (1965); NAACP v. Button, 371 US 415, 428 (1963); Communist Party v. Subversive Control Board, 367 US 1, 81 (1961); Bates v. Little Rock, 361 US 516, 523 (1960); NAACP v. Alabama, 357 US 449, 459-460 (1958); Barrows v. Jackson, 346 US 249, 257 (1953); Pierce v. Society of Sisters, 268 US 510 (1925); Truax v. Raich, 239 US 33 (1915).*

FAR CONTRARY TO SETTLED LAW AS TO RAISE QUESTIONS OF DUE PROCESS FUNDAMENTAL FAIRNESS AND EQUAL PROTECTION OF THE LAWS.

REASONS FOR GRANTING THE PETITION

Analysis of "truly enormous" literature and cases expressing alarmed concern about "proliferating" motions to disqualify opposing counsel concludes they "pose a serious threat to the judicial process."[3] Calling them "a dangerous game," this Court just recently said it shared that concern, *Richardson-Merrell, Inc. v. Koller, 472 US ___ , 86 L Ed2 340, 350 (June 17, 1985).*

Described as "a deeply disturbing phenomenon in modern civil litigation" in his concurring opinion, Mr. Justice Brennan stressed that review of a disqualification decision after final judgment must be "stringent" *(at 353).* Mr. Justice Stevens, dissenting from the holding that review must await final dispositions, believed as most courts had previously ruled that disqualification in a civil matter should be immediately appealable *(354).*

Disqualification motions have become a "haphazard and unpredictable" process that "can devastate both the attorney and the present client."[4] But this petition arises from a case without precedent in tolerating such motion three times. It is marked by egregious final failure to consider the merits of the claims in the interest of Horizons, departures from the normal course of judicial proceedings and conflict with decisions and constitutional principles established by this Court and other important appellate tribunals. It presents then a clearcut opportunity to "help transform the disqualification process from a tactic of litigation to a quest for justice."[5]

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[3] O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification, 48 Geo. Wash. LR 693, 696 (1980).*

[4] *Note, Motions to Disqualify Counsel Representing Interest Adverse to a Former Client, 57 Tex. LR 726, 733, 740 (1979).*

[5] Id., at 749. See also, Lindgren, *Toward a New Standard of Attorney Disqualification,* American Bar Foundation Research Journal 419 (1982); Sutton, *How Vulnerable is the Code of Professional Responsibility?,* 57 N.C. LR 497 (1979) and at 671, *ABA Code of Professional Responsibility: Void for Vagueness?*

The writ should also be granted because of aspects of the case impacting the justice interests of the great majority of American families, above the poverty line and ineligible for free legal services, who cannot afford today's customary yet reasonable fees of lawyers.[6] Typical of such families are the McMahons who could not afford to pay a lawyer who had no prior ethical obligation such as the Petitioner's herein, to serve the interests of their corporation being bilked in defiance of uncompromising public policy requiring undivided fiduciary loyalty. The Order that Aubert-Sinkers account to them for the Merrill Lynch monies is not enforced although it clearly appears to be the Law of the Case.[7] Their counsel is disqualified but condoned is misconduct of the adversary lawyer -- "the epitome of apparent impropriety" -- professing simultaneous representation of adverse interests of Aubert-Sinkers and Horizons.[8] The McMahons are then deprived of a trial on the merits by what is at the least a failure of proper notice and a mix-up, by a Judge's secretary as to dates. Their appeal of the disqualification and dismissal without hearing of their meritorious claims is thrown out after their request that their attorney be permitted to represent them therein is denied.

The case impacts too upon attorneys who are willing to serve families of moderate means at considerable sacrifice and

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6 Christensen, *Lawyers for People of Moderate Means*, 5 at footnote 4 (American Bar Foundation, 1970).

7 "Account for" has a well-settled meaning to pay over what is due. *Black's Law Dictionary*, 18 (West, 1979); *NJSA 12A:9-106* (Uniform Commercial Code definition of "Account"). It cannot be satisfied by anything short of actual payment. *Port of Seattle v. Fidelity & Deposit Co., 24 F Supp. 434, 436 (DC Wash. 1938).*

8 Comment, *Disqualification of Counsel: Adverse Interests and Revolving Doors*, 81 Col. LR 199, 206 (1981). Compare *Weaver v. United Mine Workers, 492 F2d 580 (DC CA. 1973)* with *Yablonski v. United Mine Workers (I), 448 F2d 1175 (DC CA. 1971)* and *(II) 454 F2d 1036 (DC CA. 1971), cert. den., 406 US 906 (1972).* (P9a, 44a) Aubert-Sinkers counsel also engaged in *ex parte* contact with a judicial office in an attempt to render moot the Order to Account. (P14a)

sometimes, as herein, substantial expense when faced with the modern dilemma of personal economic interest versus professionalism.[9] See the McMahons' certified statement May 16, 1981 to the court (P167a) rejecting Stanley's suggestion that they allow him to withdraw as counsel to preclude any attempt to distract from the fraud upon Horizons.

Koller, supra, affords due recognition to the separate harms inflicted upon counsel and the client by disqualification, stating that the attorney "may well have a personal interest in pursuing an immediate appeal, an interest which need not coincide with the interests of the client." Moreover, it points out, "This Court has never held that prejudice is a requisite to reversal of a judgment following erroneous disqualification of counsel in either criminal or civil cases." *86 L Ed2 at 349, 351.*

In the instant case, the issue of the constitutional limits of disqualification is clearcut since there was no trial or judgment on the merits in which prejudice arising from the absence or presence of counsel would have to be assessed. This Court should resolve the important question as to whether the rights of an attorney under the U.S. Constitution are violated when he is disqualified upon the ground, lacking any rational factual foundation, of appearance of impropriety[10] when admittedly there is no conflict or claim of prejudice to the opposing party.

a. The Decision Below Conflicts with Principles Established by this Court.

Mr. Justice Powell said for this Court that lawyers have a "vital right of access to the courts," *In re Griffiths, 413 US 717, 729 (1973)* and repeated the holding in *Truax v. Raich, 239 US 33, 41 (1915)* by Chief Justice Hughes:

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9 Christensen, *supra, 147.*

10 The impropriety of "appearance of impropriety" is noted at *44 Fordham LR 130, 132 (1975)* because it is a means of avoiding analysis of the facts. It is "superfluous at best and highly damaging at worst because it can permit disqualification when an attorney ... actually behaved ethically." Id. at 152.

> It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.

An attorney was said to be "like the court itself, an instrument or agency to advance the ends of justice." *Theard v. United States, 354 US 278, 281 (1957).*

The basic rule as to lawyers established more than 100 years ago in *Ex parte Garland, 4 Wall 333, 18 LE 366 (1867)* is frequently cited by this Court today:

> The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court or at the command of the legislature. It is a right of which he can only be deprived by a judgment of the court for moral or professional delinquency.

It was relied upon in *Schware v. Board of Bar Examiners, 353 US 232, 239 (1957)* for the rule that a person cannot be prevented from practicing except for valid reasons that may not contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Where there is no evidence in the record which rationally justifies exclusion, due process and equal protection of the laws are violated because such exclusion is both arbitrary and discriminatory. *Konigsberg v. State Bar of California, 353 US 252, 262 (1957).*

"Lawyers also enjoy first-class citizenship" and the full panoply of rights guaranteed under the U.S. Constitution. *Spevack v. Klein, 385 US 511, 516 (1967)* overruling *Cohen v. Hurley, 366 US 117 (1961).* Such constitutional rights may not be ignored "under the guise of prohibiting professional

misconduct," *NAACP v. Button, 371 US 415, 439 (1963).* Lawyers were held to have a constitutional right "which the State cannot abridge" to employment under union plans to provide legal services; "broad rules framed to protect the public and to preserve respect for the administration of justice" must not impair "the value of associational freedoms," *United Mine Workers v. Illinois State Bar, 389 US 217, 222 (1967); Railroad Trainmen v. Va. State Bar, 377 US 1, 8 (1964).*

Brinkerhoff-Faris v. Hill, 281 US 673, 680 (1930) made it clear that "the federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive or administrative branch of government." Constitutional rights "are denied as well by the refusal of the state court to decide the question as by an erroneous decision of it." *Lawrence v. State Tax Commission, 286 US 276, 282 (1932).* Further, it has been emphasized by this Court, *NAACP v. Claiborne Hardware Co., 458 US 886, 924 (1982):*

> ...it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made.

This Court declared, "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell, 418 US 539, 552 (1974).* Where there is no rational basis for the action, it is constitutionally invalid. *City of Cleburne v. Cleburne Living Center, ___ US ___, 53 LW 5022, 5026 (July 1, 1985).*

In the instant case, it is quite impossible to understand how the trial Judge could conceive "public apprehension" of a nonexistent conflict of interest when it is "basic" in New Jersey law that a corporation is a entity separate and distinct from the individuals therein and it was equally well settled that ethically Petitioner owed his duty to the Horizons corporation and those seeking to further its interests.

b. The Disqualification Conflicts with the Trial-Taint-Only Rule of the Second Circuit Gaining Widest Acceptance.

"Appearance" of conflict or impropriety invoked below is no standard at all. It "defies analysis"[11] and evokes the sharpest condemnation from the bench, bar and scholars exemplified by O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline, 62 Marquette LR 313 (1979)*. The *ABA Standing Committee on Ethics and Professional Responsibility* in its *Formal Opinion 342 (1975)*, Footnote 17 holds that it is "too vague to be useful" and can degenerate "into a determination on an instinctive, *ad hoc* or even *ad hominem* basis." In "calling for the exercise of subjective judgment, unaided by objective norms," it suffers from the constitutional infirmity that has led this Court to void statutes for vagueness. See the analysis of vagueness by Mr. Justice Harlan, dissenting, in *NAACP v. Button, supra, 371 US at 466*. It simply cannot meet the test set forth in *Button (at 439)*: "where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

An analytical approach that avoids "appearance" infirmities appears to be taking hold throughout the country based upon the reasoning of the Second Circuit in *Board of Education v. Nyquist, 590 F2d 1241, 1246 (2 CA. 1979)*:[12]

> ...we have utilized the power of trial judges to disqualify counsel where necessary to

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[11] O'Dea, *supra*, note 3, at 708.

[12] Shephardizing *Nyquist* shows it has become a leading case being widely followed, including the Third Circuit of which New Jersey is a part; see *United States v. Birdman, 602 F2d 547, 560 (fn. 56) (3 CA. 1979); Kirby Coal Co. v. United Mine Workers, 470 F Supp 1032, 1035, 1036 (WD Pa. 1979); Flego v. Philips, 514 F Supp. 1178, 1183 (DC NJ 1983)*. The cases are of course too numerous to set forth here. The scholars likewise endorse the approach; see e.g.: Lindgren, *supra*, note 5, ABA 1982 Research Journal 419 *passim*.

> preserve the integrity of the adversary process in actions before them. In other words, with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of *Canons 5 and 9 of the Code of Professional Responsibility* undermines the court's confidence in the vigor of the attorney's representation of his client ... or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example in violation of *Canons 4 and 9*, thus giving his present client an unfair advantage ... (citations omitted).

And it concludes *(1247)*:

> We believe that when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases.

There is much in the discussion in *Koller* of dismay over disqualification motions which suggests that the *Nyquist* approach is consistent with this Court's thinking. The decision below is certainly in conflict with it. Disqualification should be set aside to restore fundamental fairness, which is the "essence of due process in a proceeding of a judicial nature," *Morgan v. United States (II), 304 US 1, 19 (1938)*, to the Petitioner and on the Court's own motion to the clients he was barred from making parties herein.

CONCLUSION

Petitioner prays that the writ issue.

Respectfully submitted.

By: s/L.C.S.
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